

No. 93-518

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Oregon

**BRIEF OF
DEFENDERS OF PROPERTY RIGHTS,
MICHAEL L. ACHEN,
ALLIANCE FOR AMERICA,
AMERICAN ENVIRONMENTAL FOUNDATION,
AMERICAN LOGGERS SOLIDARITY,
ARIZONA CITIZENS COALITION ON RESOURCE
DECISIONS,
APPALACHIAN FOREST MANAGEMENT GROUP,
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS,
COUNCIL ON PROPERTY RIGHTS, INC. (DAVID H. LUCAS),
AS AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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January 13, 1994

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**BRIEF *AMICI CURIAE* OF
E³ (ELLIOTT ELECTRICAL ENGINEERING),
ENVIRONMENTAL CONSERVATION ORGANIZATION,
FIFTH AMENDMENT FOUNDATION,
THE FISHERMAN'S COALITION,
HILL COUNTRY LANDOWNERS COALITION,
KONKOLVILLE LUMBER CO.,
MOLALLA TIMBER ACTION COMMITTEE,
NATIONAL CATTLEMEN'S ASSOCIATION,
NATIONAL WILDERNESS INSTITUTE,
NEW HAMPSHIRE LANDOWNERS ALLIANCE,
NORTHWEST TIMBER WORKERS RESOURCE COUNCIL,
REDWOOD REGION TELECOMMUNICATIONS,
SAVE OUR INDUSTRIES AND LAND,
STOP TAKING OUR PROPERTY,
TRANS TEXAS HERITAGE ASSOCIATION,
VIRGINIANS FOR PROPERTY RIGHTS,
WESTERN MINING COUNCIL, INC., and
WHITESTONE SOUTHEAST LOGGING CO.**

QUESTIONS PRESENTED

1. Whether the government's exaction of private property as a condition of exercising one's constitutional right to use privately-owned property violates the Fifth Amendment.
2. Whether the government can single-out an individual property owner -- through an development exaction program -- to bear the burdens of public improvements which will benefit the community as a whole.

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AS AMICI CURIAE
IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, the *amici* submit this brief *amici curiae* in support of Petitioner, Florence Dolan. The *amici* support reversal of the decision by the Supreme Court of the state of Oregon. Consent to the filing of this brief has been granted by counsel for Petitioner and counsel for Respondent, and has been lodged with the Clerk of this Court.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Reflected in this brief are the interests of millions of property owners who have joined together as a collective voice to ask this Court to enforce their constitutional rights in private property. Some of these are people whose livelihoods depend directly on the protections in property afforded by the Constitution. Others are owners of homes, leases, and other property interests such as buildings, machinery, retirement funds, savings accounts, and even ideas -- all of whom enjoy the use and benefit of private property ownership afforded by the Constitution. All of these diverse interests are before this Court because of their common understanding of the importance of private property rights as a fundamental component of individual rights and liberties rooted in the Constitution. Protection afforded to property rights in the Fourth and Fifth Amendments is the line drawn in the Bill of Rights to protect the individual and the fruits of his labor from being usurped by an overreaching government.

Many of the property owners who have joined together in this brief have firsthand experience of the ostensible schemes of government regulations which amount to "out and out extortion" -- such as the example at issue in this case. Many have themselves been victimized by a bureaucrat holding the ultimate big stick -- the ability to veto plans in which the individual's life savings are invested -- and have thus been forced to comply with the whims of the government. They know there is nothing "voluntary" when the government demands title to a portion of their property without paying for it. They have also seen how a community abandons the sole property owner when it is to be benefited from the exaction without fair compensation.

These individuals and organizations know that exactions can make the government an "intruder who enters clothed in the robes of authority in broad daylight [but who] commits no less an invasion of these rights than if he sneaks in at night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear." *Hendler v. United States*, 952 F. 2d 1375 (Fed. Cir. 1991). They know, too, the practical impossibility of taking on a government which can exhaust their resources. For all of these reasons, these *amici* echo Judge Jay Plager in his appeal that "[c]ourts should leave no doubt as

to whose side the law stands upon": the Constitution which protects private property rights. *Id.*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. It was founded in 1991 in recognition that property rights are today under siege by excessive government regulations and acts which have the effect of rendering the Constitution a worthless scrap of paper. Its mission is to vigorously protect those rights considered essential by the framers of the Constitution and promote a better understanding of the relationship between private property rights and individual rights and liberties. Defenders is a non-profit, public interest law foundation whose members are property owners, users, and beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal action affecting the public interest as well as the private property rights of its membership. Defenders of Property Rights engages in litigation across the country on behalf of its membership to stem government incursion forbidden by the Bill of Rights. Defenders of Property Rights has devoted a significant portion of its resources to the litigation of regulatory taking issues and participated in *Lucas v. South Carolina Coastal Council* case when it was before this Court.

Michael L. Achen (Battleground, WA) is a 29-year veteran of land development and building contracting, and the owner of his own contracting business. He believes that it is the duty of a contractor to provide for the health, safety, and welfare of the users of his development -- but not for the general recreation of the public unless that is the principal objective of the development.

The **Alliance for America** is a 50-state network of nearly 500 independent, grassroots property rights organizations whose collective membership represents millions of individual property owners all across the country. Groups under the Alliance's umbrella cover the full spectrum of property rights interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, and other private property protection.

The **American Environmental Foundation (AEF)** (Ocie Mills) (Navarre, Florida) was founded to bring a halt to property rights abuses that have become commonplace in America. AEF focuses on government abuse of constitutional protections in the name of protecting the environment. The organization's founder, Ocie Mills, possesses firsthand knowledge of how bureaucratic zeal to protect the "environment" can destroy lives and liberty. He and his son were both imprisoned for 21 months in a federal penitentiary for disturbing a wetland. A federal judge later ruled that the parcel of dry land designated by the government as a wetland may not even qualify as

such. AEF believes the environment can be protected within the framework provided by the Constitution.

American Loggers Solidarity (ALS) (Fortes, WA) is a broad-based, grassroots organization made up of individuals, small businesses, corporations, and elected officials at the city, county, and state level in seven states. Founded in 1989, ALS believes in the sanctity of individual rights as provided in the Constitution, recognizing that individual rights are the cornerstone of democracy and must be protected by elected officials, bureaucracies, and the judicial system.

The **Appalachian Forest Management Group** (Covington, VA) is a grassroots organization formed in 1986. Its purpose is to provide leadership and promote a balanced approach to forest management. The majority of its over 800 members are landowners committed to the principle that their property should not be taken for any public use without just compensation.

The **Arizona Citizens Coalition on Resource Decisions (ACCORD)** (Phoenix, AZ) advocates the responsible shared use of natural resources. Its members -- all of whom are landowners and representative of a broad range of interests -- believe that through the responsible management of land and resources found on it, society's present needs can be met without compromising the needs of the future.

Citizens for Constitutional Property Rights (CCPR) (Crestview, Florida) is a state-wide organization based in Florida whose mission is to secure private property guarantees provided in the Bill of Rights. CCPR is active with respect to public advocacy and awareness of governmental programs and regulations which violate the Constitution by eroding private property rights.

The **Council on Property Rights, Inc. (CPR)** (David H. Lucas) is a nationwide association formed to represent the interests of property owners in protecting their private property rights on a federal, state, and local level. David H. Lucas knows firsthand the devastating consequences for the owners of property which the government has taken without paying for it. His property was taken by excessive government regulation when the state of South Carolina refused to allow him to build the homes he had intended for two vacant lots. He was forced to take his fight to this Court in 1991. After a favorable ruling on June 29, 1992 by this Court, he was finally compensated in 1993 after remand to the courts in South Carolina.

Larry D. Elliott, P.E. is the owner of **Elliott Electrical Engineering (E³)** (Moscow, ID). E³ is a consulting engineering firm founded in 1988. Mr. Elliott believes that government is becoming too intrusive into the lives of American citizens and is concerned about the threat to his own private property rights.

The **Environmental Conservation Organization (ECO)** (Hollow Rock, TN) is a national umbrella organization of landowners and landowner associations working to balance environmental protection with economic vitality. ECO promotes free-market alternatives (based on the concept of private property rights) to federal regulations as the best method of protecting the environment. Its membership includes individuals, businesses, and nearly 500 local, regional, state, and national grassroots organizations that champion property rights and free enterprise. The outcome of the *Dolan* case has direct implications for more than seven million people who belong to ECO and its affiliated organizations.

The **Fifth Amendment Foundation** (Santa Monica, CA) is a non-profit corporation created to defend the rights of private property owners to a balanced and equitable implementation of existing or proposed development regulations consistent with the protections of the Fifth and Fourteenth Amendment to the Constitution.

The **Fishermen's Coalition** (Coronado, CA) was formed by fishermen and other concerned citizens committed to preserving their public way of life. Their goal is to promote and educate the public about responsible fishing practices and oppose environmental extremism. They believe that whenever private property is taken for public purposes -- either through regulations such as the Endangered

Species Act or Marine Mammal Protection Act -- just compensation must be paid to the owner.

The **Hill Country Landowner's Coalition (HCLC)** (Georgetown, TX) was formed in 1991 to oppose a local endangered species preservation plan to regulate land use and purchase a 30,000-acre wildlife refuge with taxpayer's funds. The coalition is committed to the principle that when the rights of the individual are threatened (as they are when the government is allowed to take private property for a greenway or bicycle path without compensating the owner), the whole fabric of American society is jeopardized.

The **Konkolville Lumber Company** (Orofino, ID) (Andy Konkol, Jr.) employs 75 people and has been in operation since 1947. Improper government takings could rob the company of productive timber land that is necessary to the livelihood of the company, its employees, their families, and beneficiaries of the goods and services that are produced, in part, by the company.

The **Molalla Timber Action Committee (M-TAC)** (Molalla, OR) was organized in 1989 to counter efforts by preservationist environmentalists to halt natural resource production on federal lands. The members of this grassroots organization believe that forests can be managed without destroying the ecosystem or economy -- balancing the needs of both people and nature.

The National Cattlemen's Association (NCA) (Denver, CO) is a non-profit trade association that speaks for 230,000 cattlemen and others from all segments of the beef cattle industry. It is affiliated with 46 state cattle associations and 29 national beef breed organizations. NCA's mission is to advance the economic, political, and social interests of the U.S. cattle industry, and works to create a positive business environment while providing consumers with a safe and wholesome product.

The National Wilderness Institute (NWI) (Washington, D.C.) is dedicated to using sound, objective science in implementing the wise management of natural resources. NWI recognizes the direct, positive relationship between progress and environmental quality and promotes private sector, constitutionally-based stewardship which enhances the use of resources without unnecessarily inhibiting economic growth. NWI supports environmentally-sound site and situation-specific practices which harness the creative forces of the private sector, protect or extend private property rights, and reduce the regulatory burden of government.

The New Hampshire Landowners Alliance (Campton, NH) was founded in 1991 as a non-profit, non-partisan, state-wide organization. It now has a membership of approximately 1,700 property owners. Its goal is to foster the conservation of natural resources in a manner consistent with the constitutional property

rights of all New Hampshire property owners. They participate in legal action when it is in the interest of its members, and when the issues will affect broad public policy.

The Northwest Timber Workers Resource Council (Elgin, OR) is a grassroots organization formed to represent the interests of people in the Pacific Northwest regarding the stewardship of nature. The Council advocates a balanced approach to forest management that saves jobs and respects the ecosystem.

The Redwood Region Telecommunications (RRT) (Fortuna, CA) project is dedicated to informing Americans about the importance of private property rights. RRT serves as an information clearinghouse to inform landowners -- particularly those in the Pacific Northwest -- about issues involving land use, environmental regulation, and property rights on a local and national level.

Stop Taking Our Industries And Land (SOIL) (Hines, OR) is a local chapter of the Oregon Lands Coalition. A grassroots organization, it is comprised of ranchers, loggers, miners, and businessmen interested in protecting their jobs and strengthening local economies. SOIL seeks to protect its members' property from confiscation by uncompensated government takings by encouraging legislation which requires its protection.

Stop Taking Our Property (STOP) (Porter County, IN), formed to fight the expansion of the Indiana Dunes National Lakeshore in

1991, is comprised of over 300 families who have been impacted by a variety of government policies involving property rights. Members of STOP believe that government should be bound by constitutional protections of property -- whether it be the issuing of permits, filling wetlands, or building new stores.

The **Trans Texas Heritage Association (TTHA)** (Alpine, TX) is a state-wide organization dedicated to the protection of landowner rights. Founded in 1991, their members collectively own over 15 million acres of land in Texas and other states. Members of TTHA believe private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and environmental regulations and government land acquisitions limit the spectrum of private property ownership.

The **United Property Owners Association (UPOA)** (Pearland, TX) is a small, grassroots organization formed to protect the interests of property owners in regard to government regulations. UPOA seeks to gain fair compensation for privately-owned property in the extreme cases where government must exact private holdings.

Virginians for Property Rights (Warrenton, VA) serves as an umbrella organization for grassroots property rights groups throughout Virginia. VPR's goal is to educate, serve, and develop groups of citizens in every community to ensure that government

officials adhere to the protections of private property guaranteed in the Constitution.

The **Western Mining Council, Inc.** (Reno, NV) was formed 50 years ago to protect the property interests and constitutional rights of the small business miner. Many in its membership have been robbed of their livelihoods and a lifetime of investment by excess regulation and overreaching government -- all in violation of the Constitution. These members strongly support the reversal of the trend of government to take private property without just compensation, whatever the circumstances.

The **Whitestone Southeast Logging Company** (Hoonah, AK) is a high-lead, cable logging company that has been in business since 1963. It employs over 250 workers who log on both public and private land. In the past, Whitestone Southeast was forced to forfeit large portions of prime timber land they had purchased due to a law enacted after their transaction. Their ability to challenge the constitutionality of the law was thwarted by lack of money to continue the suit.

STATEMENT OF THE CASE

This case squarely presents the issue of whether a city may take fee title to private property without paying for it pursuant to a plan

determined in advance to acquire a connected series of privately-owned parcels of property, for the benefit of society as a whole.

Unlike the *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992), case, this is not a regulatory taking case in which the property owner complains that the city of Tigard has deprived her of all of the beneficial and productive uses of her property due to the operation of a regulatory permitting scheme. In this case, the city has flatly demanded fee title to approximately ten percent of Mrs. Dolan's land in exchange for granting her permission to use her land.

The city has attempted to justify the taking of Mrs. Dolan's property without just compensation on two grounds. First, the city asserts that the required dedication of private property is to address the problems of increased water runoff and increased traffic caused by the enlarged plumbing and electrical supply store. Yet, the court below made no finding as to the proportion of bicyclists and runoff that the Petitioner's expanded store would create.

Second, in response to the argument that the city's taking effected a physical occupation of the Petitioner's land, the court below described the dedication of ten percent of Florence Dolan's property as "voluntary." Viewing the city's demands as "voluntary" is, of course, simply an attempt to camouflage what is in reality an "out and out plan of extortion." *Nollan v. California Coastal Commission*, 483

U.S. 825 , 837 (1987). Only in the never-never land of legal fiction could the city of Tigard's demand for Florence Dolan's property in exchange for a building permit be considered "voluntary." Indeed, "voluntary," as it is commonly understood, connotes a situation in which the act of giving is "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself" and as an act which is "[p]roceeding from the free and unrestrained will of the person; resulting from free choice without compulsion." *Black's Law Dictionary* 1575 (6th ed., West, 1990).

In the unvarnished world of reality, the city of Tigard purposefully and deliberately set upon a course of achieving what it deemed an important social objective by using the muscle of the city's zoning authority to extract the necessary property from its owners. Specifically, this city determined that it would be in the public interest to construct a municipally-owned pedestrian/bicycle path and streamside greenway. So, the city's planners drew up designs which were formally adopted into the comprehensive plan.

The city then adopted an ordinance which on its face contains the following extortion scheme:

"The City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to . . . require the necessary easement or dedications for the pedestrian/bicycle pathways." (City of Tigard, Comprehensive Plan, Section 8.4, Pet. App. J-2). Describing

the land to be dedicated as "the backbone on the open space system," (*id.*) the streamside greenway was to be acquired through the "dedication of all undeveloped land within the 100-year flood plain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." (*id.*).

The following are set forth as explicit approval standards for "site development review:"

Where . . . development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle plan.

(City of Tigard Community Development Code, 18.120.180, Pet. App. K-1).

Notably, the city's plans contained no references whatsoever for the purchase of any of the desired property or compensation for any of the owners.

If Justice Oliver Wendell Holmes were alive today, he could point to his prescient warning of over 70 years ago that government could easily overwhelm the individual and the Constitution in its zeal to do what it perceived as public good:

"[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

The city of Tigard's scheme of extorting land from individual property owners as a price for being able to make any significant modifications to their property -- despite the lack of a substantial relationship between the demand and the proposed new use -- is the modern embodiment of Justice Holmes' concerns.

SUMMARY OF ARGUMENT

The facts of this case amply demonstrate that the city deliberately set about acquiring fee title to private property through an exaction scheme which provided for no compensation to the owners. Accordingly, this case falls directly within the prohibition against the taking of private property for public use without just compensation contained in the Fifth Amendment of the Constitution. The just compensation clause of the Fifth Amendment is not ambiguous. Containing the only express money damages provision in the Constitution, the clause demands that money be paid to an owner of private property whenever that property is taken for public use.

The city of Tigard does not deny that its requirement for Mrs. Dolan to dedicate approximately ten percent of her property in exchange for its approving her building permit application will result in the city's having full title to the land taken. Nor is there any dispute that the city is taking the land for public use. Nor is there any valid

justification for the taking, other than vague suggestions that the easement taken will be used to address problems of storm water runoff and increased traffic caused by the larger building.

However, the lack of proportionality between the city's required dedication of property and the problems the taking purported to address, in itself renders the taking patently unconstitutional. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) accord *United States v. James Daniel Good Real Property*, 1993 U.S. LEXIS 7941; 62 U.S.L.W. 4013 (Dec. 13, 1993) (seizure of private property not justified by the needs of the government when compared to the importance of the private interests at risk).

As this Court recently affirmed in *United States v. James Daniel Good Real Property*, *supra*, constitutional protection of private property rights is essential because "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 1193 U.S. LEXIS at 13. Upholding schemes which extort private property from its owners as a price of exercising their constitutional right to use private property in a reasonable manner violates not only the express guarantee of the just compensation clause, but eviscerates the framers' purpose in securing the protection of private property in the Constitution. See Story, J., *Commentary on the Constitution of the United States*, para. 1790 (1833) ("[I]n a free government, almost all other rights would become

worthless if the government possessed an uncontrollable power over the private fortune of every citizen.") Thus, a reversal of the decision of the court below is crucial to ensure that the protections to private property guaranteed by the Constitution be realized.

ARGUMENT

I. The Fifth Amendment Requires Just Compensation In Every Case Where Private Property Is Taken For Public Use.

This is not a regulatory taking case in which the property owner complains that a regulatory scheme "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393/415. Accordingly, it is inappropriate to apply either the "per se" rule of *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. CT 2886 (1992) or the *ad hoc* approach of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In this case, the government demands fee title from the Petitioner. This circumstance falls squarely within the Fifth Amendment's prohibition: "[N]or shall private property be taken for public use, without just compensation."

U.S.CONST. amend. V; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)(applying the just compensation clause to the states via Section 1 of the Fourteenth Amendment).

The Fifth Amendment contains no limitations or exceptions for its guarantee and a state (or its political subdivision) may not refuse such compensation where a taking has occurred. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316, n. 9. (1987). The obligation for just compensation simply attaches whenever government action works a taking of private property rights. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy to which he is entitled if private property is taken. *First English*, 482 U.S. at 304; *United States v. Clarke*, 445 U.S. 253, 257 (1980).

In *Jacobs v. United States*, 290 U.S. 13 (1933), this Court rejected the state's position that it could legislatively limit one's constitutional right to just compensation:

[The lower court's] ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of eminent domain. That right was guaranteed by the Constitution. . . . The form of the remedy did not qualify the right. It rested on the Fifth Amendment. Statutory recognition was not necessary. . . . The suits were. . . founded upon the Constitution of the United States. The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full

equivalent of that value paid contemporaneously with the taking.'

Id. at 16-17 (citations omitted).

This guarantee of just compensation applies whether property is taken through the traditional process of eminent domain or through non-judicial means. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the owner of a pond converted it into a marina and, in the course of the construction, connected it to a bay. As a result, the public acquired access to what had once been the owner's private pond. The government asserted jurisdiction over the pond on the grounds that it had become a navigable water of the United States, available for public use. This Court disagreed; that is, if the pond was to become public, then the owner must be paid just compensation:

[T]he Government must condemn and pay before it takes over the management of the land-owner's property. In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of Petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. [citations omitted] And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

Id. at 179-80. See also *United States v. Dow*, 357 U.S. 17 (1958) (government required to pay for easement taken as a result of the government's laying pipeline over private property).

Here, the city of Tigard determined to construct a bicycle path and maintain a greenway across a number of privately-owned parcels -- including the Petitioner's property. Ordinarily, a government agency wishing to acquire property for such public purposes would attempt to acquire the property voluntarily at an agreed-upon price or, if agreement could not be reached, to exercise the sovereign right of eminent domain to condemn the property. In either case, the government would receive title to the property, and the property owner would receive the just compensation guaranteed by the Constitution. *First English, supra*; see also *United States v. Miller*, 317 U.S. 369, 373 (1943)(just compensation means the full and perfect equivalent in money of the property taken and the owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken).

II. A Regulatory Permitting Scheme May Not Be Used to Extort Private Property Without Just Compensation.

The court below found that the title demanded of the Petitioner was not a compensable taking because the dedication was required in exchange for a building permit which the Petitioner sought. Indeed, the court below went so far as to assert that some of the bicyclists would use the bicycle path to visit the Petitioner's plumbing store and that some of the stormwater runoff accommodated by the greenway

would come from the Petitioner's parking lot. The court below stopped short of saying, however, that the bicycle path and greenway were necessitated by the Petitioner's hardware store, and made no finding as to proportion of bicyclists and runoff that the Petitioner's expanded store would create.

The just compensation mandate of the Fifth Amendment was intended to prevent government from "forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In the absence of a finding that the Petitioner's hardware store contributes substantially to bicycle traffic and runoff, the exaction of private property without just compensation cannot be constitutionally sustained.

The facts in this case demonstrate that the concept of a bicycle path and greenway came first. The city's ordinances, see Pet. App. J-1, 2., were not tailored to address municipal burdens created by the Petitioner's plumbing store expansion, but as a transparent means of obtaining the right of way without paying for it. Had the Petitioner's property not been located along the route of the bicycle path and greenway, she might have obtained the permit to construct the identical expansion of her store without extraction of title to any of her property, even though the store might have been visited by an

identical number of bicyclists and created the same amount of storm water runoff.

In short, this is not a case in which a developer of a housing project is required to install roads, sewer, water, and electrical utilities to service the houses he plans to build. The principle purpose of requiring the Petitioner to dedicate private property to the city is to benefit the city and not the Petitioner's own property. The fact that the dedication is made a "condition" of permit issuance does not obscure the city's scheme: to obtain title to the right of way without paying for it.

The city's true intent is further illustrated by supposing that the Petitioner withdrew her permit application and decided not to expand. In that case, she would not be required to dedicate the needed right of way to the city, leaving the city of Tigard with a bicycle path which lacked an essential link across the Petitioner's land. To complete the bicycle path, the city would be thus be required to condemn the land and pay for it. The accident of the Petitioner's permit application is extraneous to the city's need for her land, without which the entire bicycle path and greenway are useless.

To create this pathway may be a good idea, but "that does not establish that [Petitioner] (and other [owner's of property along the bicycle path and along the greenway]) alone can be compelled to contribute to its realization." *Nollan*, 483 U.S. at 841.

III. Required Dedications Are Not "Voluntary," But a Taking Without Just Compensation.

Relying on *Yee v. City of Escondido*, 503 U.S. ___, 112 S. Ct. 1522 (1992), the court below found the required dedication of the Petitioner's property to be "voluntary" and thus not an unconstitutional taking. First, the simple response is that if the Petitioner wished to voluntarily donate her land to the city, the matter would not be before this Court. The term "voluntary" refers to a situation in which the act of giving is "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself" and as an act which is "[p]roceeding from the free and unrestrained will of the person; resulting from free choice without compulsion." *Black's Law Dictionary* 1575 (6th ed., West, 1990).

This Court's decision in *Yee* is in apposite. In that case, this Court found that the owner of a mobile home park had voluntarily opened his property to the public and, therefore, could not contend that rent control regulations relating to mobile home parks being required to admit the public to his mobile home park constituted a taking of the right to exclude that public. *Yee* does not stand for the proposition that having opened one's property to the public justifies demanding dedications of that property for purposes unrelated to the use of the property. Had the town of Escondido demanded of the Yee's that they dedicate a bicycle path and greenway across their mobile home

park, the justification for the taking would not have existed; otherwise, a single public use (e.g., a mobile home park or a plumbing store) would justify demands of dedications for highways, railroad crossings, transit corridors, airport runways, and every other manner of public use.

The extraction of private property as a condition of using one's property¹ may not be said to be "voluntary." The ownership of property includes the right to make reasonable use of it; to condition the exercise of this right on dedication of a portion of the property is to eviscerate the right to use the property itself. Such a constitutional right may not be so conditioned. See *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) (Marshall, J.) ("[T]he government does not have unlimited power to redefine property rights."). Forcing the property owner to choose between not using his or her property at all or giving a portion of it to the city as condition of using the remainder is a Hobson's choice in which voluntariness plays no part.")

¹ Property rights protected by the Constitution have been described by this Court as the rights "to possess, use and dispose" of the property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. at 435 and *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

CONCLUSION

For the forgoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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